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July 14, 2006

Andrea Nixon, Clerk
Department of Telecommunications & Energy
Cable Division
One South Station, 4th Floor
Boston, Massachusetts 02110

Re: CTV-06-1 - Petition by Verizon New England, Inc. to Request Rulemaking Regarding Competitive License Regulation

Dear Ms. Nixon:

Enclosed for filing in the above-referenced matter is Verizon New England Inc.'s Initial Comments.

Thank you for your assistance in this matter.

Sincerely,

Alexander W. Moore

cc: Service List

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

CABLE TELEVISION DIVISION

Petition by Verizon New England Inc. to commence a rulemaking pursuant to 207 C.M.R. § 2.01(1) to amend 207 C.M.R. § 3.00 et seq.: Licensing.	**Docket No. CTV-06-1**

INITIAL COMMENTS OF VERIZON NEW ENGLAND INC.

The Cable Division has a unique opportunity to bring beneficial changes to the video marketplace in Massachusetts. With the approval of Verizon's proposed regulation, the Cable Division can bestow on Massachusetts customers the many benefits of competition including lower prices and better service while at the same time create investment incentives that will bring new jobs and economic benefits to the Commonwealth. As recognized by the Order Instituting Rulemaking ("Order"), "Verizon's proposed rules have the potential of increasing video competition in the Commonwealth, thereby conferring the benefits of that competition on consumers." Order at 5.

The Order seeks comment from interested parties on a number of issues related to Verizon's Petition. Verizon's comments follow.

I. Issues Identified in the Order Opening Rulemaking

A. Proper Forum for Discussion

The Cable Division can and should act expeditiously to approve Verizon's petition and thus bring the benefits of enhanced video competition to Massachusetts

customers as soon as possible. While it is true, as the Order notes, at 6-8, that the FCC and Congress also are considering measures to promote video competition that could affect the franchising process in Massachusetts, there is no certainty that either will act or act quickly. Accordingly, the Cable Division should act expeditiously to ensure that Massachusetts consumers receive the significant benefits that promoting video competition are sure to produce.

The Cable Division has correctly defined the significant cost of delay in approving Verizon's petition in this case: "unnecessarily delaying the benefits of cable competition to Massachusetts consumers." *Id.* 8. And as Verizon demonstrated in its Petition, the benefits to Massachusetts consumers from acting promptly to promote enhanced video competition will be substantial. Both Government Accountability Office and Federal Communications Commission reports have found that video service rates are considerably lower in communities that have wireline cable competition. *See* Verizon Petition, at 9. Indeed, in the markets where FiOS℠ TV service has been rolled out nationwide, the respective incumbent cable provider has responded with competitive pricing, well below its national average. Bank of America recently conducted a survey of cable promotions available in FiOS℠ markets before and after disclosing an awareness of FiOS℠ availability to incumbent customer service representatives. *See id.*, at 10. That survey found that incumbent cable customer sales representatives were willing to offer more competitive pricing after consumers mentioned FiOS℠. The study concluded that when new competitors have entered a cable market, existing providers have dropped prices by 28 to 42 percent. This experience shows that Massachusetts consumers will experience significant benefits from Verizon's entry.

In addition, new studies demonstrate that video competition will provide additional benefits, both in terms of job creation and in terms of a boost to the economy. For example, a recent study by Stephen Pociask of TeleNomic Research estimates that 2,900 jobs could be added in Massachusetts alone as a result of video competition.[1] A study by the Phoenix Center found that just one year's delay in franchise reform costs Massachusetts consumers $165 million in lost savings on competitive cable services – savings that would become additional disposable income for Massachusetts consumers.

The Order correctly recognized that there has long been a federal policy of fostering competition among cable operators, and noted that the Cable Division has taken steps to further this policy in Massachusetts. *See* Order at 4. Timely approval of Verizon's petition would further the policy in favor of competition, to the clear benefit of Massachusetts consumers. The Cable Division, therefore, should move quickly to grant the petition and should not delay the resulting benefits to Massachusetts consumers based on speculation about federal action that may or may not be forthcoming.

B. Elimination of the Threshold Decision by Issuing Authorities

As the Order itself seems to recognize, the provision of the state regulations that appears to give local authorities discretion to decide whether to consider a competitive franchise is contrary to binding federal law. That regulation provides that a local authority has 60 days in which to decide "*whether* the licensing process shall be undertaken." *See* 207 C.M.R. § 3.02(2) (emphasis added). This conflicts directly both with the governing federal statute and with the First Amendment.

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[1] The Cabling of America: Job Growth in Cable TV and Video Services; Stephen B. Pociask, TeleNomic Research, May 25, 2006.

As an initial matter, the federal statute expressly provides that "a franchising authority may not grant an exclusive franchise and may not unreasonably refuse to award an additional competitive franchise." 47 U.S.C. § 541(a)(1). It further provides that any state or local statute or regulation that "is inconsistent with this Act shall be deemed to be preempted and superseded." *Id.*, § 556 (c). Accordingly, to the extent that the state regulation can be read to give local authorities unfettered discretion to decide whether to consider an application for a competing franchise, it is invalid.

In addition, the cable television franchise process is a classic prior restraint on constitutionally protected speech. *See Turner Broadcasting Systems v. FCC*, 512 U.S. 622, 636 (1994) (First Amendment protects cable companies' right to offer video programming services); *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 494 (1986). The doctrine of prior restraints requires that laws subjecting the exercise of First Amendment freedoms to the prior restraint of a license spell out narrow, object standards that will guide the licensor's decision. *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150-151 (1969). In particular, the cable licensing process can not be used as a mechanism to prohibit lawful speech, and, among other things, cannot give local authorities discretion to determine whether to allow particular speakers to engage in protected speech. *See e.g., Shuttlesworth*, at 149-150 (regime allowing denial of parade permit if "the public welfare, peace, safety, health, decency, good order, morals or convenience require that it be refused" did not pass constitutional muster); *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 772 (1988) (ordinan ce granting mayor broad latitude regarding issuance of permits to place newsracks on public

property was not constitutional). Yet that is precisely what 207 C.M.R. § 3.02(2) does, which makes it facially invalid.

For both these reasons, there is no legal basis on which an LFA could decide not to proceed on an application to offer competitive video services. Likewise, even where an LFA decides to move forward with an application, actions (or inaction) that delay entry would violate both the federal statute and the First Amendment. The express terms of the federal statute – which provides that franchise authorities may not "unreasonably refuse to award" a competitive franchise – make clear that this provision does *not* apply only when an LFA *denies* a competitive franchise. *See* 47 U.S.C. § 541(a)(1). It also applies when a franchising authority unreasonably fails to grant a competitive franchise, as it might do through simple inaction or delay. And the First Amendment likewise prohibits authorities from unduly delaying approvals to engage in protected speech. *City of Littleton v. Z-J Gifts D-4, L.L.C.*, 541 U.S. 774, 780-781 (2004) (*quoting FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 228 (1990)); *see also Church of the American Knights of the Ku Klux Klan v. City of Gary*, 334 F.3rd 676, 682 (7th Cir. 2003).

Indeed, in recent comments to the FCC, the United States Department of Justice ("DOJ") confirmed that unnecessary delays in the application process, demands for goods and services that are unrelated to the provision of video services, and imposed build-out requirements all constitute a refusal to award an additional franchise, and thus conflict with federal law.[2]

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[2] "Ex Parte Submission of the Department of Justice," MB Docket No. 05-311, filed May 10, 2006, at 7 ("DOJ Comments").

C. Length of the Process

Verizon in its Petition demonstrates that its proposed streamlined process for competitive licensees should take no longer than three months from application to grant of a final license by an LFA. The Cable Division "seeks comment on whether the proposed three-month period is reasonable, considering the applicable standard of review." The three-month period is indeed eminently reasonable and is necessary to ensure the timely consideration of applications for competitive licenses.

One of the biggest problems with the current franchise regime is that the process simply takes too long. Delay results from inertia, arcane or lengthy application procedures, bureaucracy or, in some cases, inattentiveness or unresponsiveness by the LFA. In other cases, delay is used by municipalities as a negotiating tactic in an effort to force the applicant to agree to unreasonable and often unlawful conditions or concessions. The DOJ notes that "LFA efforts to secure inappropriate concessions can serve to delay the franchising process and/or impose additional costs sufficient to undermine the business case for entry into a particular geographic area."[3] And delay is nearly always increased as a result of the efforts of incumbent cable operators to forestall the onset of video competition.

Verizon's experience illustrates well the delay endemic in the current franchising process. Verizon started seeking video franchises in mid-2004 and by February of this year had sought franchises from well over 300 LFAs nationwide, yet in that year-and-a-half period Verizon obtained only 51 franchises, a significant portion of which were obtained in Texas after that state adopted a streamlined franchising process. In Massachusetts, Verizon has submitted cable license applications to over 40 communities

[3] DOJ Comments at 11.

but has obtained franchises in only 11, and those 11 franchises took, on average, 13 months to complete. Where Verizon and the municipality are currently in negotiations, the ongoing process has already taken over 14 months on average. Finally, there are some communities which have initiated the franchising process, yet Verizon has been waiting as long as a year for the community to even *begin* negotiations.

The Order correctly seeks to ensure that the franchising process in Massachusetts is consistent with federal requirements, and as noted above, 47 U.S.C. § 541(a)(1) on its face prohibits delay in franchising decisions. Congress' very choice of words – "unreasonably refuse to award" – requires that the franchising process move forward at a reasonable pace, and a franchising authority's unreasonable failure to grant a competitive franchise, as it might do through simple inaction or delay, violates the statute.

Verizon's proposed three-month timeframe would ensure that the process for issuing competitive licenses leaves no room for incumbents' stall tactics or for franchising authorities simply stringing out the process in order to obtain concessions or unlawful franchise conditions. Such tactics frustrate both the express terms and the purposes of 47 U.S.C. § 541(a)(1). Moreover, delaying approval of a competitive license in order to increase the leverage of an LFA is not in the consumers' best interests and is inconsistent with federal and state policy promoting competition for video services. The DOJ concludes that:

> [c]onsumers generally are best served if market forces determine when and where competitors enter. Regulatory restrictions and conditions on entry tend to shield incumbents from competition, and are associated with a range of economic inefficiencies including higher production costs, reduced innovation, and distorted service choices. They should be avoided except where

> necessary to protect other important statutory goals and even then be tailored as narrowly as possible.[4]

Moreover, three months is more than sufficient time for an LFA to give due consideration to a competitive license application, especially in light of the limited set of factors federal law allows an issuing authority to consider when reviewing an application for a competitive license. *See* Verizon's Petition, at 6. Likewise, both the Division's current rules and Verizon's proposed rule require an LFA to issue a final license as soon as the applicant: (1) has complied with G.L. c. 166A, § 3, by not operating a cable system without a license; (2) has filed a license application that substantially provides the information specified in c. 166A, § 4 and the Division's Form 100; and (3) substantially complies with the various operational requirements stated in c. 166A, § 5 (*e.g.* carries appropriate insurance, is not in the business of repairing or selling television sets or radios, maintains a local office or local telephone connection in the community, etc.). *See* 220 CMR 3.04(1) and proposed rule 3.04.5(3). Three months is more than adequate time for an LFA to ensure an applicant's compliance with these narrow and well-defined prerequisites.

Verizon's experience in other states bears out that three months is more than adequate for an LFA to review a competitive license application. Texas has found that the franchising process can be handled in 17 days, and some other LFAs with whom Verizon has individually negotiated franchises have granted a franchise in as little as a month. Legislation recently passed by the New Jersey legislature provides for a 45-day, system-wide franchise approval process.[5]

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4 DOJ Comments at 3.

5 See New Jersey Assembly Bill No. 804, § 16(f).

The Order notes "as points of reference" that the review period under federal law for license renewals and transfers is limited to 120 days. This is just 30 days longer than the process proposed by Verizon for competitive licenses, and the award of a competitive franchise should be treated with *more* expedition than the modification, renewal, or sale of an incumbent's monopoly franchise. This is so because, in the latter case, the incumbent is already in the market and is able to engage in speech, whereas in the case of a competitive entrant, the application process restrains both competition and protected speech. A tightly prescribed timeframe is especially appropriate for a provider like Verizon that is already authorized to upgrade and operate the network over which its video services will be transmitted. The LFA's ability to manage the public rights-of-way – the principal rationale for franchise requirements – is not altered in any way by the proposed competitive license regulation.

The proposed three-month licensing period allows ample time for an LFA to consider a competitive license application while minimizing regulatory restrictions and conditions on entry, and should be approved.

D. Applicant's Incentive to Provide Supporting Data To Issuing Authority

The Order, at 10-11, questions whether the proposed rule would motivate an applicant to withhold information from an LFA in light of the *de novo* review of the LFA's decision by the Cable Division. Nothing could be further from the truth. The delay attendant upon an appeal of an LFA decision to the Cable Division is a significant negative consequence to the applicant. An applicant for a competitive license has every incentive to provide the information needed by a franchise authority to act on its application, because the applicant wants to provide video services as quickly as possible.

As noted above, delay for any reason – including an LFA's failure to grant an application for lack of information – exposes the applicant to unreasonable and often unlawful conditions or concessions. Delay also allows the incumbent cable provider greater opportunity to blitz the franchise area and lock up customers with long-term contracts before the applicant can reach the market. Also, while the review at the Cable Division is de novo, it would be readily apparent to the Cable Division if the applicant did not file information with the LFA that was truly necessary to review its application.

E. Application Solicitation

The Division should not apply the solicitation and notice requirement of 220 CMR § 3.03(2) to competitive license applications. The Order acknowledges that the Cable Division "routinely waives" the requirement to solicit applications in national trade journals and "reduces the notice requirement from 60 days to 30 days." Order at 8. There is, however, no reason to retain any solicitation requirement at all for competitive licenses. Where a municipality has a cable television provider, and another provider applies for a competitive license, no purpose is served by seeking even more applications. LFAs do not and cannot legally award licenses on a competitive bid basis. Indeed, G.L. c. 166A, § 3 requires that every cable license be "non-exclusive," and § 6 states that, "In the event more than one application is filed in any city or town, the issuing authority shall choose that applicant ***or those applicants*** which in its opinion will best serve the public interest." (Emphasis added.) Thus, an LFA must judge each application on its own merits, and it is both illegal and counter-productive to play providers off against one another to see who gets a single or limited number of franchises.

F. Provisional License Requirement

The Order notes that "(t)he purpose of the provisional license is to allow the applicant time to obtain the financing needed to build the cable system. The provisional license requirement also provided 'an important check on a new licensee's commitment to fulfill all obligations under the franchise agreement and state law.'" Order at 8-9, *citing In Re Amendment of 207 CMR § 2.00 - § 10.00*, R-25, at 16 (1996). But the Cable Division also notes that there has been no instance in the past ten years where a final competitive license was preceded by a provisional license of any significant duration. This is more than enough evidence that whatever importance the Division ascribed to the requirement in 1996 clearly has diminished to the point of irrelevancy in the past ten years.

The Order nevertheless asks whether the protections of a provisional license might have value where a competitive licensee does not have access to the public ways and may require "significant construction prior to offering services." The answer is no. Under G.L. c. 166, § 21, every company incorporated "for the transmission of television signals, whether by electricity or otherwise" has access to the public ways. Moreover, 220 CMR §3.03(9) prohibits construction of a cable system before a final license is issued, precluding the provisional license from playing the role suggested by the Division.

G. Standard of Review for Cable Division

The Order seeks comment "on the standard by which the Cable Division would determine whether an application were reasonable and whether such standard should be included in the regulation." Order at 11.

Verizon's proposal is that on appeal from a decision by an LFA, the Cable Division would make its determination based on the same standard of review required of LFAs. Thus, the Cable Division would evaluate the information provided by the applicant in order to determine whether the applicant has met the standards, described in Section C above, for issuance of a final license stated in both 220 CMR 3.04(1) and proposed rule 3.04.5(3). If the Cable Division finds that the applicant has met those standards, then it would have to conclude that the licensee should be awarded a franchise and so direct the LFA to issue one within a specific time period.

II. Conclusion

The Cable Division has recognized that "Verizon's proposed rules have the potential of increasing video competition in the Commonwealth, thereby conferring the benefits of that competition on consumers." Order at 5. Verizon has demonstrated in its Petition and in these initial comments that its proposal is reasonable and adequately meets all of the concerns and issues raised by the Division in its Order. There is no question that the current local franchising process in Massachusetts generates unwarranted delays and is engrained with overreaching practices, which are encouraged by incumbent monopoly cable operators in an effort to hinder competitive entry into the video market. Accordingly, in order to provide Massachusetts consumers with the full benefits that will result from prompt entry into the video marketplace and the widespread

deployment of advanced broadband networks, the Division should side with consumers and expeditiously approve Verizon's petition.

Respectfully submitted,

VERIZON MASSACHUSETTS

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Dated: July 14, 2006